Boulder City Hospital, Inc. *and* General Sales Drivers, Delivery Drivers and Helpers and, Representing the Public Sector, Teamsters Union, Local 14, affiliated with the International Brotherhood of Teamsters. Case 28–CA–22283

September 30, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

On June 24, 2009, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. Both parties filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] except as discussed below, and to adopt the recommended Order as modified.

For the reasons set forth in the judge's decision, we affirm his conclusions that the Respondent violated Section 8(a)(1) of the Act by interrogating employee Kevin Dale Slover about his union activities and, on another occasion, by telling him that the Respondent's hospital would close if the employees selected the Union as their representative. We also affirm the judge's conclusion, for the reasons he stated, that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to use employee Gregory Ostrowski as a per diem employee because of his support for the Union. As explained below, however, we reverse the judge's recommended dismissal of the allegation that the Respondent violated Section 8(a)(1) when it posted a memo about its harassment policy.

[1] The Respondent excepts to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] There are no exceptions to the judge's findings that (1) the Respondent did not violate Sec. 8(a)(1) by creating an impression among employees that their union activities were under surveillance and (2) that the Respondent did violate Sec. 8(a)(1) by stating that employees who supported the Union could not work for the Hospital.

Facts

On October 1, 2008, employee Kevin Dale Slover was on break when Human Resources Director Carol Davenport asked to speak with him in her office. Davenport then inquired if Slover was aware of any union activity. After Slover said, "[N]o," Davenport said an employee had told her that Slover solicited the employee to sign a union card. When Davenport asked if this was true, Slover again answered, "[N]o." As mentioned, we agree with the judge's finding that Davenport's questions amounted to unlawful coercive interrogation.

On that same day, Environmental Services Manager Isabel Orvis told Leslie Ann Anderson, Davenport's assistant, that two of Orvis' employees felt that they were being harassed by another employee (not Slover) to sign up for the Union. Orvis explained that the employees had been asked more than once to sign. Anderson relayed Orvis' report to Davenport, who then repeated the harassment allegations to the Respondent's CEO, Thomas E. Maher. At no point did any of the Respondent's officials investigate the circumstances of the union card solicitation.

Instead, according to Davenport, she and Maher decided that it would be "a good idea" to remind employees about the Respondent's harassment policy. Maher similarly testified that Davenport told him that employees were being pursued about the Union "over and over again" and that a reminder about the hospital's policy on harassment was warranted. Later that day,[3] the Respondent posted the following memo by the time clocks:

> Please be reminded that harassment or threatening behavior in any degree by or between employees will not be tolerated at Boulder City Hospital.
>
> We would like to remind you of our Hospital Wide Policy 195.1 *Illegal Harassment* and 105.2 *Dealing with Allegations of Discrimination and/or Illegal Harassment.*
>
> If you feel that you are being harassed or threatened in any way, you have the right to talk with Human Resources regarding your treatment.

The written personnel handbook policy cited in the second paragraph of the memo states that "Illegal harassment is a form of discrimination and is defined as any conduct directed toward another because of that person's sex, race, age, national origin, color, disability, sexual orientation, religion, ancestry, or veteran status, or any

[3] Slover testified that he observed the memo about 4 hours after he was interrogated by Davenport.

other unlawful basis that is inappropriate or offensive as determined by using a 'reasonable person' standard."

The handbook then provides specific examples of illegal harassment[4] and specifies the procedures for handling reports of such misconduct.

Judge's Decision

The judge dismissed the allegation that the memo posting was unlawful. He noted that the memo referred to a written harassment policy that the General Counsel agreed was lawful. The judge reasoned that, when read in this context, the memo "simply reminded employees of the Hospital's lawful rule."

Discussion

The Board has long held that an employer's invocation of a "harassment policy" during a union campaign "has the potential dual effect of encouraging employees to report to Respondent the identity of union card solicitors who in any way approach employees in a manner subjectively offensive to the solicited employees, and of correspondingly discouraging card solicitors in their protected organizational activities." *W. F. Hall Co.*, 250 NLRB 803, 804 (1980), quoting *Colony Printing & Labeling, Inc.*, 249 NLRB 223, 225 (1980), enfd. 651 F.2d 502 (7th Cir.1981). As the Board has explained:

> It is well settled that the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited. To that end, an employer's invitation to employees to report instances of "harassment" by employees engaged in union activity is violative of Section 8(a)(1).

Ryder Truck Rental, 341 NLRB 761, 761 (2004) (citations omitted), enfd. 401 F.3d 815 (7th Cir. 2005).

In this case, the judge erred in treating an employer memo that, under the circumstances, would reasonably be interpreted by employees as an invitation to report "harassment" by employees engaged in union solicitation as no more than a restatement of a lawful written handbook policy, which addressed illegal harassment of an altogether different nature and force, primarily involving impermissible sexual behaviors. In fact, the language of the memo is obviously not limited to the conduct prohibited by the handbook policy. Posted in the midst of a union organizing campaign, the memo informs employees that "harassment or threatening behavior *in any degree* by or between employees will not be tolerated" and that they could talk to human resources if they felt "harassed or threatened *in any way*."

We are not dealing here with a facial challenge to the Respondent's handbook policy, but rather with the posting of the memo. That the memo referred to the handbook's lawful policy did not mean that, under the circumstances surrounding the posting of the memo, employees necessarily would understand the memo's statements as referring only to harassment as defined in the handbook. The memo itself did not repeat or reproduce the language of the handbook. Instead, it used its own broad, general language to describe the conduct that was prohibited ("harassment or threatening behavior in any degree"), and it invoked the subjective reactions of employees in inviting them to report coworkers' conduct ("[i]f you feel that you are being harassed or threatened in any way"). Employees would reasonably assume that the memo's sweeping definitions faithfully reflected the Respondent's policy. It seems unlikely, in contrast, that employees would read the memo, then retrieve the handbook and derive a narrower interpretation of prohibited, reportable harassment by reading the two documents together. In short, there is no basis for finding the memo lawful as simply a republication or reminder of the lawful handbook policy. And, of course, the existence of a lawful antiharassment policy is not a license for an employer to commit unfair labor practices in the name of implementing that policy.[5]

It is true that the memo at issue here does not expressly refer to union activity. However, the Board has held that an employer statement prohibiting harassment that does not explicitly restrict protected activity may still violate Section 8(a)(1) of the Act, "dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2)

[4] The examples are:

1. Verbal conduct such as epithets, derogatory comments, slurs, or unwanted sexual advances, invitations, or sexually degrading or suggestive words or comments. . . .

2. Visual conduct such as derogatory posters, notices, photographs, cartoons, drawings, or gestures, leering, making sexual gestures, and displaying sexually suggestive objects or pictures.

3. Physical conduct such as unwanted touching, impeding or blocking normal movement, or interfering with work or movement.

4. Threats, . . . [or] demands to submit to sexual requests in order to keep job . . . and offers of job benefits in return for sexual favors.

5. Retaliation for . . . reporting, or threatening to report harassment.

[5] See, e.g., *Blue Chip Casino, L.L.C.*, 341 NLRB 548, 555–556 (2004); *Shearer's Foods, Inc.*, 340 NLRB 1093 (2003); *Whirlpool Corp.,* 337 NLRB 726 (2002), enfd. 92 Fed.Appx. 224 (6th Cir. 2004). "The Board has long held that legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to investigation and possible discipline on the basis of the subjective reactions of others to their protected activity." *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) (footnote collecting cases omitted), enfd. 263 F.3d 345 (4th Cir. 2001).

the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). The memo is unlawful applying either the first or second factor. As to the first, we find that employees such as those who had recently complained about union solicitation to Supervisor Orvis would reasonably construe the memo posting as responsive to their complaints and applicable to this protected activity. Certainly, employee Slover would reasonably perceive a link between solicitation activity and a memo about harassment posted on the same day management unlawfully inquired whether he was engaged in such activity. As to the second factor, the Respondent admits that it posted the memo in response to union solicitation activity. Because it did not investigate employee complaints about union card solicitations, it had no reason to believe they entailed anything more than persistent or annoying, but still statutorily protected, conduct.[6]

As did the judge, our dissenting colleague reads the Respondent's memo as nothing more than a reiteration of the antiharassment policy. We conclude, for the reasons already explained, that employees would reasonably interpret the memo differently, under the circumstances present here, which feature a union organizing campaign met by an employer's unfair labor practices. The Respondent admits that the memo was posted in response to union activity. It went up immediately after the Respondent received complaints from employees about union solicitation and after it had unlawfully inquired about whether employee Slover was engaged in such activity. It is no answer, then, for the dissent to point out that the policy predated the Union's organizing campaign. Nor would it be enough if the memo could reasonably be interpreted as noncoercive so long as a contrary interpretation was also reasonable. In such situations, the Board will find a violation. See, e.g., *Double D. Construction Group.*, 339 NLRB 303, 303–304 (2003) ("The test of whether a statement if unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction."). At a minimum, this memo was reasonably open to a coercive interpretation.

[6] As such, the reports differ from the conduct in the cases our dissenting colleague cites at fn. 1 of his dissent. *Aramark Services, Inc.*, 344 NLRB 549, 549–550 (2005) (employee intimidated employees by a "hostile and angry attitude" including yelling, and poking at least one employee); *PPG Industries,* 337 NLRB 1247 (2002) (employee made "vulgar, sexually explicit remarks"); ***BJ's Wholesale Club*****,** 318 NLRB 684, 684 fn. 2 (1995) (employee repeatedly interrupted another employee during worktime); *Robertshaw Controls Co.*, 196 NLRB 449, 453 (1972), enf. denied in part on other grounds 483 F.2d 762 (4th Cir. 1973) (employee deliberately knocked over another employee's work).

The dissent takes issue with our application of *Lutheran Heritage Village*, supra, contending in part that the Respondent's memo was posted "not in response to organizing activity, but in response to employee reports of harassment." But the "reports of harassment" made clear that the "harassment" was in connection with union solicitation and nothing in the reports would have led the Respondent reasonably to believe that any nonprotected conduct had occurred. We have no difficulty, then, in concluding that the memo was a response to union activity in the sense that *Lutheran Heritage Village* contemplates.

Finally, our colleague argues that our decision places employers in an untenable situation, by preventing them from calling employees' attention to a lawful antiharassment policy in situations where it might be of interest to them. That implication is unwarranted, however. This would be a different case had the Respondent's memo consisted only of its second sentence ("We would like to remind you of our Hospital Wide policy . . . .") and had it been posted in a context free of unfair labor practices, or if the Respondent's memo had acknowledged what Board law makes clear, namely that its employees had the statutory right to "engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited." *Ryder Truck Rental*, supra, 341 NLRB at 761.

In sum, we conclude that the Respondent's officials equated union solicitation activity with harassment in deciding to post the October 1 memo and that employees reading the memo would reasonably construe its language to prohibit protected activity. Whether viewed as an overbroad application of the lawful written handbook policy or as the promulgation of a new harassment policy, we conclude that the memo posting violated Section 8(a)(1) of the Act, and we shall modify the Order and notice language accordingly to address this violation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Boulder City Hospital, Boulder City, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(d) and reletter the subsequent paragraphs.

"(d) Posting a memo during a union organizing campaign that employees would reasonably construe as equating protected union card solicitation activity with prohibited harassment and encouraging employees to report such activity to management."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 30, 2010

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

I agree with my colleagues in all respects except for their finding that the Respondent violated Section 8(a)(1) of the Act by posting a memo prior to the election reminding employees of its unquestionably valid "Illegal Harassment" policy.

As often happens during union organizational campaigns, certain employees in this case complained to superiors that they were being harassed by coworkers soliciting them to sign union authorization cards. In most circumstances, such solicitation is protected concerted activity, and an employer cannot state or imply to employees that it is proscribed harassment. However, the protection afforded such solicitation is not absolute or limitless; and, protected solicitation can cross over into unprotected harassment.[1] Moreover, in the modern workplace governed by numerous individual rights laws and darkened by an apparent increase in violent incidents, an employer not only has a substantial and legitimate interest in maintaining an effective nondiscriminatory antiharassment policy *and* in making sure that all of its employees are aware of and understand this policy, it has a legal obligation to do so.

The Respondent here has such an antiharassment policy in its employee handbook. It is concededly valid, addressed primarily to inappropriate sexual or physical conduct, and there is no evidence that the policy has ever been invoked or enforced to penalize employees for engaging in any protected union activity. During the course of the Union's organizing campaign, two employees reported to their supervisor that they were being "harassed" by another employee who was trying to convince them to support the Union. Those reports were relayed to higher-management officials who determined, as the judge found, that it would be appropriate "to remind employees of the Hospital's harassment policy." That is exactly what the Respondent then did, posting a memo that stated in full:

> **Please be reminded** that harassment or threatening behavior in any degree by or between employees will not be tolerated at Boulder City Hospital.
>
> **We would like to remind** you of our Hospital Wide policy 105.1 *Illegal Harassment* and 105.2 *Dealing with Allegations of Discrimination and/or Illegal Harassment*.
>
> If you feel like you are being harassed or threatened in any way, you have the right to talk with Human Resources regarding your treatment. [Emphasis added.]

The majority asserts that "there is no basis for finding the memo lawful as simply a republication or reminder of the lawful handbook policy." This, despite the facts that: (1) the memo expressly states that is precisely what the Respondent was doing; (2) the memo specifically references the lawful policy, which, in turn, defines prohibited "harassment" and describes the "threats" and other behavior subject to the policy; (3) the memo makes no reference to card solicitation activity, union activity in general, or complaints about such activity; (4) there is not a shred of evidence that the policy was enforced inconsistently with its lawful terms to restrict in any way protected concerted activities; and (5) the judge found that "[r]ead in context, the posted memo simply reminded employees of the Hospital's lawful rule." A sounder "basis" for the judge's conclusion is difficult to imagine.

My colleagues nonetheless contend that the memo would be perceived by employees as a broader prohibition—in effect a new rule implicating protected union activity—simply because (1) it did not recite verbatim the language of the lawful antiharassment policy; (2) it used zero tolerance phrases ("in any way" and "in any degree"); and (3) it informed employees that they have the right to talk with human resources if they perceive themselves to be harassed, a "subjective" component the majority deems inconsistent with the underlying policy. As to the first point, the memo expressly refers to the handbook where the verbatim language of the policy can be found, rather than attempting a paraphrastic summary

[1] E.g., *Aramark Services, Inc.*, 344 NLRB 549, 549–550 (2005) (arbitrator's upholding discharge of employee for harassing other employees was not clearly repugnant to the Act where the employee intimidated employees into signing a union-related petition by displaying a "hostile and angry attitude" including yelling, and poking at least one employee); *PPG Industries,* 337 NLRB 1247 (2002) (respondent lawfully disciplined male employee for sexual harassment of a female employee while soliciting authorization cards); *BJ's Wholesale Club*, 318 NLRB 684, 684 fn. 2 (1995) (employer lawfully warned employee for harassing another employee while soliciting authorization card during her work time); *Robertshaw Controls Co.*, 196 NLRB 449, 453 (1972) (employee was lawfully disciplined for harassment while soliciting).

that might be misconstrued. As to the second point, the zero tolerance language is a description of how the valid Illegal Harassment policy is to be enforced, not an expansion of the definition of conduct that is considered to be harassment. As to the third point, exactly how else is an employer to clarify for an employee who feels subjectively harassed, either as the result of union card solicitations or Girl Scout cookie solicitations, that the conduct complained of does or does not meet the objective harassment standard set forth in the handbook policy? For some employees, just reading the handbook will not answer their concern. Moreover, the memo's reference to right to speak with human resources in no way suggests that employees' individual subjective perceptions, rather than the objective terms of the policy, will define the scope of impermissible conduct subject to sanction.

The majority refers to external circumstances that allegedly would reinforce a reasonable objective belief that the memo posting equated union solicitation activity with harassment. First, there is the situation of the two employees whose complaint about a card solicitor undisputedly led to the posting. Their complaints were not investigated. There is no evidence that any of the Respondent's officials told them the repetitive solicitation was proscribed harassment, or that any official spoke to, much less took action against the card solicitor. Even assuming the complainants correctly divined that the memo posting was in response to their expressed concerns, all the memo told them was to read the handbook policy or to speak with human resources. The situation of employee Kevin Dale Slover was no different. He was unlawfully interrogated about whether he had engaged in card solicitation. He was not told that he could not solicit or that he would be violating the illegal harassment policy if he did. Assuming Slover regarded the memo posting shortly after this interrogation as a response to his solicitation activity, he, like the two coworkers of an opposing mind on the issue of union representation, was told nothing more than that the handbook policy defined what was harassment and that anyone feeling harassed could talk to human resources. Not having himself been warned for harassment after admitting his solicitation activity, there is no objective basis for finding that he would reasonably believe that the memo posting was a covert attempt to chill this activity.

Contrary to the majority, that analysis of employer rules set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), does not support finding a violation. The Board in *Lutheran Heritage* explained that the first question is whether, given a reasonable reading, in context, the rule explicitly restricts activity protected by Section 7. See *Lutheran Heritage*, supra, 343 NLRB at 646. In this case, the majority concedes that neither the memo nor the Illegal Harassment policy contains an explicit restriction of protected activity.

If the rule does not explicitly restrict Section 7 activity, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647. The majority erroneously asserts that the Respondent's memo is unlawful under the first and second prongs. As discussed above, employees would not reasonably read the memo to prohibit Section 7 activity. Similarly, the majority's conclusion that the rule at issue in this case was promulgated in response to union activity turns on their mistaken view that the memo represents a new rule, rather than a reminder of the valid Illegal Harassment policy promulgated long before any union appeared on the scene. In any event, the Respondent reminded the employees of the existence of the policy not in response to organizing activity, but in response to employee reports of harassment. Absent any indication that the Respondent would not have taken the same action in response to reports of harassment by solicitations unrelated to protected activity, there is no warrant for inferring unlawful purpose in the posting. Thus, no violation should be found under a *Lutheran Heritage* analysis.

Ultimately, the single circumstance of real consequence to the majority is that the memo was posted during an organizational campaign in response to complaints about union solicitation. I readily agree that the Board should be alert to employers' attempts to deter such activity in the guise of encouraging employees to report ill-defined harassment. On the other hand, the Board must be cognizant of employers' substantial and legitimate interest in maintaining and communicating a valid anti-harassment policy.[2] There cannot be a per se or reflexive position that any reminder of such a policy, when triggered by complaints about union solicitation, is unlawful. Particularly when neither the reminder nor the policy to which it refers does not even mention union activity, a posting such as the Respondent's can just as easily serve to inform employees that most, but not all, card solicita-

[2] I note that the majority relies in part on *W. F. Hall Printing Co*., 250 NLRB 803 (1980). That case is readily distinguishable. The employer there, having no harassment policy, sent a letter to employees directly asking them to refuse to sign union authorization cards and to report to their foremen if any employee tried to "harass you or try to pressure you into signing a card." Moreover, *W. F. Hall Printing* predates not only *Lutheran Heritage* but also all of the important Supreme Court jurisprudence establishing the existing legal framework for hostile work environment and sexual harassment claims.

tion is protected conduct that must be tolerated even if unwanted.

In sum, I would affirm the judge's finding that the memo posting was a lawful reminder of a lawful rule and I dissent from my colleagues' failure to do so.

Dated, Washington, D.C. September 30, 2010

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT tell employees that the Hospital might close if employees selected the General Sales Drivers, Delivery Drivers and Helpers and Representing the Public Sector, Teamsters Union, Local 14, affiliated with the International Brotherhood of Teamsters as their collective-bargaining representative.

WE WILL NOT say that employees who supported the Union could not work for the Hospital.

WE WILL NOT post a memo during a union organizing campaign that employees would reasonably construe as equating protected union card solicitation activity with prohibited harassment and encouraging employees to report such activity to management.

WE WILL NOT deny work opportunities to employees because they supported the Union, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Gregory Ostrowski whole for any loss of earnings as a result of the discrimination against him, plus interest.

BOULDER CITY HOSPITAL, INC.

Stephen E. Wamser, Esq., for the General Counsel.
James T. Winkler, Esq. (Littler Mendelson, P.C.), of Las Vegas, Nevada, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on May 12, 2009. The original charge was filed on December 17, 2008,[1] by the General Sales Drivers, Delivery Drivers and Helpers and Representing the Public Sector, Teamsters Union, Local 14, affiliated with the International Brotherhood of Teamsters (the Union) and the complaint was issued February 27, 2009. The complaint as amended at the hearing alleges that Boulder City Hospital, Inc. (the Hospital) violated Section 8(a)(1) by interrogating employees about their activities and support for the Union, creating an impression among employees that their union activities were under surveillance, threatening employees by informing them that work opportunities were not available because of their union activities, threatening employees that it would close its facility if the employees selected the Union, and by maintaining and enforcing a rule that encourages employee to report harassment. The complaint also alleges that the Hospital violated Section 8(a)(3) and (1) by promulgating and enforcing the antiharassment rule, refusing to provide Greg Ostrowski with work opportunities and by removing Ostrowski from the December work schedule. The Hospital filed a timely answer that denied that it had violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Hospital,[2] I make the following.

FINDINGS OF FACT

I. JURISDICTION

The Hospital, a corporation, provides inpatient and outpatient medical care at its facility in Boulder City, Nevada, where it annually derives gross revenues in excess of $250,000 and purchased and received goods valued in excess of $50,000 directly from points located outside the State of Nevada. The Hospital admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in 2008, unless otherwise indicated.

[2] The General Counsel's brief was especially useful in assisting me to resolve issues of credibility.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

Thomas E. Maher is the Hospital's chief executive officer and Carol Davenport works as its human resources director. Andre Pastian is the Hospital's acute care manager; her duties include the staffing and scheduling of nurses working in the emergency room. Gregory Frances Ostrowski, the alleged discriminatee in this case, worked as a registered nurse in the emergency room for the Hospital; he began working for the Hospital in July 2003. In late 2008, the regular schedule provided for a registered nurse to work in the emergency room 7 a.m. to 7 p.m. and from 7 p.m. to 7 a.m. and a certified nurses assistant to work from 10 a.m. to 10:30 p.m. During that time period Pastian allowed the nurses to schedule themselves so long as the time periods described above were covered. The Hospital does not employ part-time nurses, but it does employ per diem nurses. The Hospital defines per diem employees as employees who work as needed and who do not have guaranteed shifts or hours. Although per diem employees generally receive a higher wage rate than full-time employees, they do not receive any benefits that full-time employees receive. A list of per diem employees used by the Hospital is posted for employees to use when filling out the schedule.

The Union began an effort to organize certain employees at the Hospital and Ostrowski played a leading role in that effort. Kevin Dale Slover works for the Hospital as a registered nurse in the emergency room; he has worked for the Hospital since 2004. Ostrowski and Slover signed authorization cards for the union in May. Thereafter while at work Slover and Ostrowski solicited employees to sign the Union's authorization cards.

The Hospital has a Personnel Policies & Procedures handbook. Section 105.1 of the handbook is entitled "Illegal Harassment" and states:

> Illegal harassment is considered a form of discrimination and is defined as any conduct directed toward another because of that person's sex, race, age, national origin, color, disability, sexual orientation, religion, ancestry, or veteran status, or any other unlawful basis that is inappropriate or offensive as determined by using a "reasonable person" standard. The "reasonable person" standard considers whether a reasonable person would find the behavior or conduct in question offensive.

The handbook then gives the following examples of illegal harassment:

> 1. Verbal conduct such as epithets, derogatory comments, slurs, or unwanted sexual advances, invitations, or sexually degrading or suggestive words or comments . . . .
> 2. Visual conduct such as derogatory posters, notices, photographs, cartoons, drawings, or gestures, leering, making sexual gestures, and displaying sexually suggestive objects or pictures. . . .
> 3. Physical conduct such as unwanted touching, impeding or blocking normal movement, or interfering with work or movement.
> 4. Threats, either overt or veiled . . . in return for sexual favors.
> 5. Retaliation for . . . reporting, or threatening to report harassment. . . .

The handbook also describes the process for handling reports of illegal harassment. The General Counsel does not contend that this rule in unlawful. He does contend, however, that the Hospital violated the Act when, as described below, it reminded employees of this rule.

On about October 1, Isabel Orvis, environmental services manager, told Leslie Ann Anderson, Davenport's assistant, that her employees Edwin Reynoso and Judith Herridia were being harassed by another employee, Silvia Zavalas, who was trying to get them to sign up for the Union. Orvis told Anderson that the employees had been asked more than once to sign up for the Union. Anderson then reported this to Davenport. Davenport in turn advised Maher of this matter and they decided to remind employees of the Hospital's harassment policy. So on October 1 the Hospital posted the following memorandum to employees near the timeclocks:

> Please be reminded that harassment or threatening behavior in any degree by or between employees will not be tolerated at Boulder City Hospital. We would like to remind you of our Hospital Wide policy 105.1 *Illegal Harassment* and 105.2 *Dealing with Allegations of Discrimination and/or Illegal Harassment.* If you feel like you are being harassed or threatened in any way, you have the right to talk with Human Resources regarding your treatment.

On about October 1 as Slover was walking to the break room to get a glass of tea, Davenport noticed him and said that she needed to talk to him. They went into Davenport's office where Davenport asked Slover if he was aware of any union activity. Slover told her no, he was not aware of any union activity. Davenport then said that an employee had informed her that Slover had approached the employee on the job to sign a union card; Davenport asked if this was true. Slover answered no, that he had no knowledge of that. Davenport said that Slover was a supervisor and would not be protected under any union activity and he could be subject to termination if he continued and the Hospital was to find out. At the time of this conversation Slover had not let the Hospital know of his support for the Union. These facts are based on Slover's testimony. His demeanor impressed me as someone who was accurately relating what was said. I also note that Slover was still employed by the Hospital and had been employed there for several years. In its brief the Hospital challenges Slover's credibility; it argues:

> It should also be noted that Slover has taken a different role in the union campaign than other employees. In addition to being one of the main union organizers, he specifically gave permission to a reporter to have his name publicized in a newspaper article about the union campaign at Respondent. . . . Slover has his ego involved in this case. He wants very much to discredit Respondent as much as possible.

Of course, the Act protects an employee's right to publicly support a union. Rather than undermining Slover's credibility,

the Hospital's argument in this regard shows that Slover's exercise of his Section 7 rights has rubbed the Hospital the wrong way. I conclude that Slover's testimony is credible.

On October 12 Ostrowski informed Debra Balido, chief nursing officer for the Hospital, that:

> Effective this date I am requesting my status be changed to part-time. I truly enjoy my position at Boulder City Hospital and my relationships with my co-workers. This decision in no way reflects of my job satisfaction, but is entirely based on family living arrangements, career advancement, and salary. I would like to be scheduled one shift per week. My last full-time scheduled date available will be October 31.

On October 16 the Hospital reclassified Ostrowski as a per diem employee effective October 31.

Balido informed Maher of Ostrowski's letter of resignation. During the course of that conversation Maher told Balido that he did not want Ostrowski to work as a per diem because Ostrowski was one of the people who spearheaded the Union. As Balido and Pastian each admitted, Balido then told Pastian that Maher did not want the Hospital to use Ostrowski as a per diem because of Ostrowski's union activity. Pastian admitted that she told Martha Howard, the employee who was responsible for monitoring the scheduling of nurses in the emergency room, that Maher did not want Ostrowski used as a per diem because of his union activities.

Regina Dawn Archuleta has worked as a licensed practical nurse since July 2006; most recently she has worked in the emergency room. An occasion arose in early November when the Hospital was looking to find a nurse to fill a vacancy in the schedule. Archuleta suggested to Pastian that she call Ostrowski to fill the vacancy, but Pastian replied that she could not do so because Maher did not want Ostrowski in the building because Maher thought Ostrowski spearheaded the Union. These facts are based on Archuleta's testimony; I conclude she was credible witness for reasons similar to my assessment of Slover's testimony. Moreover, the Hospital's witnesses have admitted that Maher in fact told his subordinates that he did not want Ostrowski working as a per diem because Ostrowski supported the Union.

Meanwhile, the Hospital hired Elaine Troyer to fill Ostrowski's full-time position; Troyer went through an orientation period in November. On November 10, Pastian posted new rules for scheduling in the emergency room that contained the following:

> Also, as I hire new staff to replace those that have left, the new full time employee will be working the shifts left open by the employee leaving, having priority over a per diem staff member, please remember that per diem means "as needed."

Ostrowski had normally worked on Mondays and Tuesdays; thus, Pastian intended that Troyer would normally work Mondays and Tuesdays.

On about November 11, Pastian was looking at the schedules when Slover asked what Pastian was doing. Pastian answered that Maher had informed her that Ostrowski was probably the employee behind the Union and that they needed to get Ostrowski off of the schedule. Pastian also told Slover that if the Union came in the Hospital might have to close. These facts are again based on Slover's testimony. Pastian denied that she ever told an employee that the Hospital might close if the union came in. However, Pastian did testify that the Hospital took the position that it might have to close if it did not receive the additional funding it believed it needed; the funding was the subject of a referendum that was rejected by the voters at the November 4 election. I conclude it would have been an easy leap for Pastian to assert that union activity might also cause the Hospital to close.

Ostrowski worked as a per diem for the Hospital on November 24. When Davenport told Balido that Ostrowski had worked; Balido reminded Pastian that Maher preferred that the Hospital not use Ostrowski as a per diem. Meanwhile, in early November the Hospital began the process for the registered nurses to schedule themselves to work during December by posting a blank schedule. Ostrowski's name had been added to the list of per diems, described above, that is posted near the schedule. At some point as the process was running its course Martha Howard, a registered nurse, wrote Ostrowski's name on the schedule to work all five Mondays that December. However, Pastian revised that schedule by eliminating Ostrowski from the schedule and replacing him with Troyer, the registered nurse the Hospital had hired to replace Ostrowski. Pastian also removed Minnie Small, who was scheduled to work Tuesdays, from the December schedule and replaced her too with Troyer; Small was known by Pastian as being antiunion.

Maher testified that even if he had not made the comments about not wanting Ostrowski to work as a per diem because of Ostrowski's union activities he still will not have wanted the Hospital to use Ostrowski based on other reasons. Suffice it to say that I find that testimony not credible. Pastian testified that Ostrowski's union activity did not have "any bearing" on the schedule changes, but in light of the evidence described above I find this entirely incredible; I credit her testimony only when it is supported by other objective, uncontested facts. However, Pastian also testified that she removed Ostrowski and Small from the December schedule because she had hired Troyer to replace Ostrowski, Troyer completed her orientation in November and Pastian placed Troyer in the holes in the schedule left by Ostrowski's departure. For reasons explained in more detail below, I find this testimony to be convincing.

On February 9, 2009, after the Hospital received the charge alleging that it had made a threat to close the facility if the employees selected a union, Maher sent the following letter to employees:

> In my recent letter to you concerning the union campaign I noted that an NLRB charge against the Hospital had been filed by the union. I promised to keep you apprised of the NLRB's investigation of the charge. At this point the union has presented evidence and the NLRB has requested our response. We have scheduled a meeting with the NLRB and will be presenting our evidence very soon. I also told you that we would do every thing we could to ensure that our message to you in this campaign is presented in a lawful manner. There are a multitude of technical rules as to what a company can or cannot do in a

> campaign, and we are striving to comply with not only the letter of these technical rules, but the spirit of the law as well.
>
> There is one allegation that I would like to address right now. There is an allegation that one supervisor told one employee that management said that the Hospital would close if the employees voted for the union. This is absolutely not true. I want to ensure [sic] you that if the employees vote for the union that the Hospital will not close because employees chose to have union representation. If the union should win the election, we would have an obligation to bargain with the union in good faith, which we would do.
>
> I will be meeting with you in this campaign to describe the bargaining process, so that you can make an educated decision on whether you want to have union representation. In the meantime, please be assured that we respect the rights of employees under the National Labor Relations Act, to engage in union activity, and to refrain from engaging in union activity, and we will never take any action against any employee for exercising their rights under the law.

Thereafter at meetings the Hospital held with employees to discuss the Union, Maher repeated that the threats that the Hospital would close were not true.

Also after the Union filed the charge alleging that the Hospital unlawfully failed to employ Ostrowski, upon advice of counsel, Maher instructed his subordinates that they could use Ostrowski as a per diem. In March 2009, the Hospital began using Ostrowski as a per diem in its emergency room.

B. Analysis

1. The 8(a)(1) allegations

The complaint alleges that the Hospital, through Davenport, unlawfully interrogated an employee and created the impression of surveillance. I have described above how Davenport summoned Slover into her office and asked Slover if he was aware of any union activity. Slover told her no, he was not aware of any union activity. Davenport then said that an employee had informed her that Slover had approached the employee on the job to sign a union card; Davenport asked if this was true. Slover answered no, that he had no knowledge of that. At the time of this conversation Slover had not let the Hospital know of his support for the Union. I apply *Rossmore House,* 269 NLRB 1176 (1984), enfd. sub nom. *HERE Local 11 v. NLRB,* 760 F.2d 1006 (1985), and examine all relevant factors to determine whether the questions Davenport asked Slover concerning union activity were coercive. I note that questioning occurred in Davenport's office as opposed to on the work floor. Davenport was a high-ranking managerial official of the Hospital and not Slover's first-line supervisor. Importantly, at that time Slover had not openly proclaimed his support for the Union to the Hospital, and he felt the need to deny the fact that he had engaged in his lawful activity in support of the Union. Finally, Davenport was somewhat persistent in her interrogation. All these factors lead me to conclude the Hospital violated Section 8(a)(1) by coercively questioning an employee about his union activities. The General Counsel points Davenport's remark to Slover that an employee had told her that Slover had attempted to get that employee to sign a card for the Union; the General Counsel argues that this gave Slover the impression that his union activities were under surveillance by the Hospital. I disagree. Davenport's remark made clear that her knowledge of Slover's union activities came not from the Hospital's surveillance but instead from a report by another employee. *Bridgestone Firestone South Carolina,* 350 NLRB 526, 527 (2007), cited by the General Counsel, supports my dismissal of this allegation of the complaint.

Next, the complaint alleges that the posting described above concerning illegal harassment was unlawful because it was done to discourage employees from assisting the Union and to encourage employees to report the union activities of other employees. In support of this allegation the General Counsel cites *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004), and *W. F. Hall Printing Co.,* 250 NLRB 803, 804 (1980). The problem with rules that urge or require employees to report "harassment" is that it may open the door for employees to report activity that they subjectively feel is unwelcome or unwanted but objectively constitutes activity protected by the Act. Put differently, the Board recognizes that the give-and-take among employees in a union organizing campaign may discomfort some employees but is nonetheless protected in order to assure robust persuasive efforts. The difficulty with the General Counsel's argument in this case is that he agrees that the harassment rule as detailed in full in the Hospital's handbook is lawful. The posted memo referred employees to that lawful rule. Read in context, the posted memo simply reminded employees of the Hospital's lawful rule. The General Counsel argues that the timing of the posting and Davenport's interrogation of Slover supports an inference that the posting was directed at Slover's union activity. I decline to make this inference; instead I conclude that the report made by Orvis to Anderson lead to the posting. The General Counsel argues that by failing to investigate the allegations of harassment the Hospital:

> [E]ffectively categorized any union activities, including asking an employee to sign a union authorization, as harassment since Respondent left it up to solicited employees or those employees' supervisor to determine what was "subjectively offensive" to them.

But by referring to the handbook rule the posting made no such invitation to employees, regardless of the Hospital's possible subjective hopes. I dismiss this allegation of the complaint.

I have described above how on about November 11, Pastian told Slover that the Hospital might have to close if the Union came in. This statement clearly is unlawful. *Homer D. Bronson Co.,* 349 NLRB 512, 514 (2007). Under *Passavant Memorial Area Hospital,* 237 NLRB 138 (1978), an employer may obviate the need for a remedy for unlawful conduct under certain circumstances. Here, Maher informed employees by letter that the Hospital would not close if the employees selected the Union. But as the General Counsel points out, Maher's repudiation of the threat was not timely inasmuch as it came about three months after the threat was made. Moreover, the repudia-

tion came in the context of other continuing unfair labor practices. I agree with the General Counsel's observation in his brief that:

> Moreover, the letter did not address the admitted denial of work opportunities to Ostrowski because of his Union activities. In this regard, Maher's assurance in the letter that "we will never take any action against employees for exercising their rights [under the Act]" when Maher's own directive caused this denial is sophistry at its worst.

By telling employees that it might close if employees selected the Union as their collective-bargaining representative the Hospital violated Section 8(a)(1).

Finally, the complaint alleges that the Hospital unlawfully threatened employees by telling them that that work opportunities were not available to them because of their union activities and support. I have described how on several occasions the Hospital told employees that Maher did not want Ostrowski to work as a per diem because of his support for the Union. *Shelby Memorial Home,* 305 NLRB 910, 919 (1991), cited by the General Counsel, is directly on point. I conclude that the Hospital violated Section 8(a)(1) by stating that employees who supported the Union could not work for the Hospital.

2. The 8(a)(3) allegations

The complaint alleges that the Hospital removed Ostrowski from working all five Mondays in the December schedule because he supported the Union. I apply *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989(1982), approved in *NLRB v. Transportation Management,* 462 U.S. 393 (1983). Ostrowski supported the Union; the Hospital knew this and demonstrated its animus to this lawful activity. The statements made by Maher and other directly admit that the Hospital did not want Ostrowski to work as a per diem because of his support for the Union. I conclude that the General Counsel satisfied his burden of proof under *Wright Line.* I turn now to decide whether the Hospital has met it burden of proof by showing that it would have removed Ostrowski from the December schedule even if he had not supported the Union. In this regard the evidence shows that after Ostrowski resigned from his full-time position and after the Hospital hired Troyer as his replacement the Hospital simply inserted Troyer in Ostrowski former full-time slot in the schedule. It appears that if Ostrowski and Small had not been removed from the December schedule Troyer, who had just completed orientation, either would not work in December or would do so at the expense of the Hospital's remaining full-time nurses in the emergency room. The General Counsel does not answer the argument concerning why the Hospital would hire Troyer to replace Ostrowski, put Troyer through orientation during November but then let a per diem employee such as Ostrowski work instead of Troyer. I conclude that the Hospital has shown that Troyer would have worked in Ostrowski's former slot in the December schedule even if Ostrowski had not supported the Union. I therefore dismiss this allegation of the complaint.

I now turn to the allegation in the complaint that the Hospital failed to employ Ostrowski as a per diem from early November to March 2009. The same evidence described above satisfies the General Counsel initial burden under *Wright Line.* The Hospital argues that the General Counsel has not shown that there was work available for Ostrowski as a per diem after he resigned as a full-time employee. But as the General Counsel points out, Ostrowski worked as a per diem in November, before Maher's directive took full effect, and then worked again beginning in March, after Maher rescinded his directive. Moreover, there is undisputed documentary evidence that during the November to March period of time the Hospital in fact used other per diems on a number of occasions. The Hospital also points out that Balido called Ostrowski in the first week of January but Ostrowski did not respond to that call. But this evidence does not show that Ostrowski would not have been available for work as a per diem on other occasions. I conclude that the Hospital violated Section 8(a)(3) and (1) by failing to use Ostrowski as a per diem employee from early November 2008 to March 2009 because Ostrowski supported the Union. The number of occasions that the Hospital would have used Ostrowski during that period of time is, of course, left for resolution during the compliance phase of this case The number shall take into account not only the availability at the Hospital of per diem slots but Ostrowski's changing availability to fill those slots.

CONCLUSIONS OF LAW

1. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

(a) Coercively questioning an employee about his union activities.

(b) Telling employees that the Hospital might close if employees selected the Union as their collective-bargaining representative.

(c) Stating that employees who supported the Union could not work for the Hospital.

2. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act by failing to use Ostrowski as a per diem employee from early November 2008 to March 2009 because Ostrowski supported the Union.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent unlawfully failed to use Ostrowski as a per diem employee from early November 2008 to March 2009 I shall require that it make Ostrowski whole for any loss of earnings, plus interest as set forth in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[3]

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the

ORDER

The Respondent, Boulder City Hospital, Inc., Boulder City, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) Telling employees that the Hospital might close if employees selected the Union as their collective-bargaining representative.

(c) Stating that employees who supported the Union could not work for the Hospital.

(d) Denying employment opportunities to employees because they supported the General Sales Drivers, Delivery Drivers and Helpers and Representing the Public Sector, Teamsters Union, Local 14, affiliated with the International Brotherhood of Teamsters or any other labor organization.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Gregory Ostrowski whole for any loss of earnings suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Boulder City, Nevada, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2008.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 24, 2009

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT tell employees that the Hospital might close if employees selected the General Sales Drivers, Delivery Drivers and Helpers and Representing the Public Sector, Teamsters Union, Local 14, affiliated with the International Brotherhood of Teamsters as their collective-bargaining representative.

WE WILL NOT say that employees who supported the Union could not work for the Hospital.

WE WILL NOT deny work opportunities to employees because they supported the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Gregory Ostrowski whole for any loss of earnings as a result of the discrimination against him, plus interest.

BOULDER CITY HOSPITAL, INC.

Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."